MAS GOLDEN BOUTIQUE SDN BHD

v.

MD ZAIN ABU

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[ORIGINATING MOTION NO: R1-25-83-98]
3 JUNE 1999

ADMINISTRATIVE LAW: *Remedies - Certiorari - Application for leave - Findings of fact of Industrial Court - Whether open to review by High Court - Arguable case - Principles in granting leave for certiorari*

Having found the dismissal of the respondent by the applicant to be without just cause or excuse, the Industrial Court ordered the respondent to be reinstated to his former post without loss of wages and benefits plus backwages from the date of his dismissal. Dissatisfied, the applicant applied for leave for an order of *certiorari* under O. 53 r. 1 of the Rules of High Court 1980 ('RHC') to quash the award of the Industrial Court on the basis that the respondent had stolen some goods from the applicant.

Held:

[1] Leave should only be granted if, on the material available the court thinks, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant.

[2] Issues of facts are for the Industrial Court to decide and it is not open to the High Court to review such findings of facts unless the material before it shows illegality, irrationality or procedural impropriety in the decision. On the facts the Industrial Court had found that the applicant could not establish theft on the part of the respondent.

Obiter:

[1] There has been a recent tendency for leave applications for *certiorari* to be made against the awards of the Industrial Court as a matter of automaticity with applicants treating the applications as if they are ordinary civil appeals against the decisions of ordinary courts dealing with the events of the case. The recital that the applications for *certiorari* are based on a challenge of decision on illegality, irrationality or procedural impropriety or all of them appear as a matter of course and the court has to be on guard to see that the applications are not ill-founded and defeating the purpose of the leave stage.

[Application for leave dismissed.]

Case(s) referred to:

Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 2 CLJ 734 ***(refd)***

Bandar Utama Development Bhd v. Lembaga Lebuhraya Malaysia [1998] 1 MLJ 230 ***(refd)***

Chan Liang Hiang Colin & Ors v. Minister for Information and the Arts [1996] 1 SCR 609 ***(foll)***

Christopher Noel O' Reilly & Ors v. Eric Wilson Mackman & Ors [1982] 3 WLR 1096 ***(refd)***

Dr Amir Hussein Baharuddin v. University Sains Malaysia [1989] 3 MLJ 298 ***(refd)***

George John v. Goh Eng Wah Bros Filem Sdn Bhd & Ors [1988] 1 MLJ 319 ***(refd)***

Inland Revenue Commissioners v. National Federation of Self Employed & Small Business Ltd [1982] AC 617 ***(foll)***

R v. Secretary of State for the Home Development, ex p Rukshanda Begum [1990] COD 107 ***(refd)***

R v. Secretary of State for Trade & Ors, ex p Anderson Strathclyde plc [1983] 2 All ER 233 ***(refd)***

Tuan Hj Sarip Hamid v. Patco Malaysia Bhd [1995] 3 CLJ 627 ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, s. 20(3)

Rules of the High Court 1980, O. 53 r. 1(2)

Rules of the Supreme Court 1965 [UK], O. 53

Other source(s) referred to:

Judicial Review of Administrative Action, De Smith, Woolf and Jowel, 1995, 5th edn

For the applicant - TM Varughese; M/s TM Varughese & Co

Reported by Farah Naim

JUDGMENT

KC Vohrah J:

An application for leave for an order for *certiorari* under O. 53 r. 1 of the Rules of the High Court 1980 (RHC) was made before me. Leave was refused. It has to be noted that O. 53 RHC relating to the application for the order of *mandamus,* prohibition, *certiorari,* etc is derived from O. 53 English RSC 1965 before it was replaced by the public law remedy of "judicial review" by S.1. 1977 No: 1955.

Our O. 53 r. 1 is substantially similar to the present English O. 53 r. 3(1). Under the present English r. 3 there is provision for an applicant who has been refused leave to renew application for leave unlike our provision but it does appear that the principles under the O. 53 RSC relating to whether leave should or should not be given generally equally apply to our O. 53 (see *Tuan Hj. Sarip Hamid v. Patco Malaysia Bhd* [1995] 3 CLJ 627; [1995] 2 MLJ 442 and the discussion by Visu Sinnadurai J in *Bandar Utama Development Bhd v. Lembaga Lebuhraya Malaysia* [1998] 1 MLJ 230, 233-235).

It is apposite to state the purpose of the leave stage and I quote from De Smith, Woolf and Jowell, *Judicial Review of Administrative Actions*, 5th edn. 1995:

> The leave stage in Order 53 proceedings serves a number of purposes. First, it may safeguard public authorities by deterring or eliminating clearly ill-founded claims without the need for them to become a party to litigation. The requirement may also prevent administrative action being paralysed by a pending, but possibly spurious, legal challenge. Secondly, for the High Court, the leave procedure provides a mechanism for the efficient management of the growing judicial review caseload. A large proportion of applications can be disposed of at the leave stage with the minimum use of the court's limited resources. Thirdly, for the applicant the leave stage, for from being an impediment to access to justice, may actually be advantageous since it enables the litigant expeditiously and cheaply to obtain the views of a High Court judge on the merits of his application. (footnotes have not been excluded in the passage).

The granting of leave is discretionary but like all cases involving discretion there are certain principles to abide by. In one of the earliest cases dealing with the discretion, Edgar Joseph Jr J (as he then was) in *Dr. Amir Hussein bin Baharuddin v. University Sains Malaysia* [1989] 3 MLJ 298 pt 299 had this to say:

> I approach this application by reminding myself that under O. 53 r. 3, the court exercises discretion whether to grant leave to apply for judicial review. The court is here first looking only at the *ex parte* application and is concerned to see whether *prima facie* there is a genuine case for review.

His Lordship then referred to the principles enunciated by Lord Diplock in *Inland Revenue Commissioners v. National Federation of Self Employed & Small Business Ltd* [1982] AC 617 at 644 where the central question to be determined is whether there is an arguable case in favour of granting the relief claimed by the applicant:

> If, on a quick perusal of the material then available, the court (that is the judge who first considers the application for leave) thinks that it discloses what might on further consideration turn out to be arguable case in favour of granting to the applicant the relief claimed, it ought in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion which the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.

Edgar Joseph J then proceeded on with his case by posing the threshold test – "Does the applicant have an arguable case for review, a sufficient interest?"

In a later case, *Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 2 CLJ 734; [1990] 3 MLJ 229 (it would appear that neither *Dr. Amir Hussein bin Baharuddin* nor *Inland Revenue Commissioners* was brought to the attention of the Supreme Court), Ajaib Singh SCJ had this to say:

> ... In his grounds of judgment the learned Judicial Commissioner had gone further than the leave stage and embarked on substantial issue on merit. We do not think that is the right approach when the application for leave to apply for an order of *certiorari* to be made.

This would seem to be in accord with the view of Lord Diplock in *Inland Revenue Commissioners* (at 644) that leave should be granted, if on the material then available the court thinks, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant. This is not to say that this bars an *inter partes* hearing to determine that there is an arguable case (see *R v. Secretary of State for the Home Development, ex p Rukshanda Begum* [1990] COD 107; and see also *Dr Amir Hussein bin Baharuddin and Bandar Utama Development Bhd* where *inter partes* hearing was held to determine if there was an arguable case).

The test formulated by Ajaib Singh is this:

> The guiding principles ought to be that the applicants must show *prima facie* that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application.

The Singapore Court of Appeal case of *Chan Liang Hiang Colin & Ors v. Minister for Information and the Arts* [1996] 1 SCR 609 at 616 has considered the passage of Lord Diplock (cited previously) in *Inland Revenue Commissioners* and also a Malaysian High Court case, *George John v. Goh Eng Wah Bros. Filem Sdn Bhd & Ors* [1988] 1 MLJ 319

dealing with the *prima facie* test and has thrown light on what the test is – that it does not impose a higher threshold than that of an arguable case and that what is required is not a *prima facie* case of reasonable suspicion.

In my view the "arguable case" test as clarified by the Singapore case is applicable in the instant case.

Md. Zain bin Abu was employed by the applicant to service mail orders for goods to passengers who placed orders for them, an extension of inflight sales. He had his services terminated by the applicant through a letter dated 2 October 1996. Md. Zain's services were terminated on the ground that he had taken and sold 20 bottles of Melatonin, the property of the applicant. Md. Zain contended that the dismissal was without just cause or excuse.

A reference was made under s. 20(3) of the Industrial Relations Act 1967 (the Act) to the Industrial Court.

The Chairman of the Court found the dismissal of Md. Zain (the claimant) to be without just cause or excuse and ordered him to be re-instated to his former post without loss of wages and benefits and ordered backwages to be paid to him from the date of dismissal.

The applicant then filed an application for leave for an order of *certiorari* to quash the award of the Industrial Court.

The statement, filed pursuant to O. 53 r. 1(2) of the RHC 1980, cites the grounds for the relief of *certiorari* sought for and all the grounds revolve on just one allegation – that the claimant had stolen the 20 bottles of Melatonin, the property of the applicant.

Much was made of the alleged admission by the claimant in the presence of some senior officers of the applicant that he had taken and sold the 20 bottles and that the court had disregarded or ignored the claimant's admission. Fundamental to this the issue is whether the claimant had stolen the bottles.

In relation to these matters several grounds were spelt out in the usual formula in review of labour law cases, alleging that the chairman of the Industrial Court had erred in law and had acted without or in excess of jurisdiction by taking into consideration irrelevant matters and failing to consider relevant matters.

An affidavit in support repeated the facts that the applicant had adduced in court as evidence (but most of which the Industrial Court had rejected) and ended with para. 16 repeating the grounds upon which relief was sought, the grounds being a repetition of those in the statement filed pursuant to O. 53 r. 1(2) mentioned earlier.

To come back to the relevant facts. The applicant through its officers carried out a reconciliation exercise of various items and found 29 bottles of Melatonin not accounted for. The management called for an inquiry at the applicant's Kelana Jaya office on 2 October 1999. The inquiry commenced in the morning and was continued in the afternoon. On the same day itself the claimant's services were terminated.

What has to be borne in mind is that in the claimant's statement of claim the claimant stated in para. 3 that by a letter dated 2 October 1996 (ie, the date of the so called inquiry) the company had terminated his services on the ground that he had allegedly taken and sold 20 bottles of Melatonin. A copy of the said letter was annexed. This letter alleged, *inter alia*, that the claimant had admitted taking the bottles and selling them in the presence of three officers during the "the inquiry session." In para. 7 of the statement of case the claimant denied the facts stated in the said letter, and in para. 4 of the applicant's statement of reply the applicant denied, *inter alia*, this para. 7 of the statement of case and put the claimant "to strict proof thereof." Clearly the central issue in the matter before the Industrial Court was whether the claimant had stolen the said 20 bottles and had sold them.

In coming to the conclusion that the claimant had been dismissed without just cause and excuse the chairman of the Industrial Court found that the applicant had failed to establish that the claimant had stolen and sold the bottles of Melatonin he was accused of.

The issue of whether the applicant had stolen and sold the goods was an issue of fact and the learned chairman had sifted through the evidence and found that it had not been established. In considering that issue he discounted the propriety of the "so called domestic inquiry" (mentioned as "inquiry session" in the letter of termination). This was a finding that he was entitled to make as para. 6(e) of the claimant's statement pleaded that the inquiry was not a formal inquiry, impugning its propriety.

In regard to what had happened at the "inquiry session", the chairman accepted the evidence of CLW3, a supervisor, who testified that he saw the claimant sitting on the floor and in a state of shock and that he also heard the claimant say, "Saya tidak bersalah, saya dianiaya." The chairman

observed that CLW3 was still an employee of the applicant and was aware and had said that the 20 bottles of Melatonin were found. In fact it will be noticed that from the Notes of Evidence that this statement of CLW3 was not challenged.

The chairman then went on to observe:

> Looking at the evidence adduced before this court it would not be wrong to say the Company acted in rather hasty manner in condemning the Claimant without carrying out proper investigation. The evidence shows that the Claimant was dismissed with immediate effect by a letter dated October 2, 1996 on the same day after the so-called domestic inquiry. The letter of suspension also dated October 2, 1996 purportedly for the purpose of further investigations and the purported domestic inquiry to be held on October 9, 1996 appeared to be a farce. How could the Claimant give his report, as instructed by the Company within 7 days from the date when he was already dismissed? And how would an inquiry be held seven days after the Claimant's dismissal?
>
> COW-1 had already made up her mind of the Claimant's guilt when she summoned him to her office on the morning on October 2, 1996. She even ignored the advice of her own officer, CLW-3 that proper procedure should be followed before a workman was dismissed. How could the Claimant steal and sell 20 bottles of Melatonin as preferred in the charge when 15 bottles were subsequently recovered at the bonded Store?.

Her further added:

> In a dismissal of an employee involving criminal misconduct, the employer should satisfy himself, through proper investigations and due inquiry that there are reasonable grounds for believing the offence against the employee has been established.

He then made the finding,

> The Company in this case had failed to establish the Claimant had stolen and sold those bottles of Melatonin he was accused of. For the above reasons I found the dismissal of the Claimant was without just cause or excuse.

Learned counsel for the applicant had argued that the criteria of dismissal were those at the time of dismissal and that the pleadings did not say the items were found elsewhere. The learned chairman from what I set out earlier had made findings relating to the time the alleged misconduct was alleged to have occurred and that is clear from his decision. The argument that the pleadings did not say that the items were found elsewhere has no merit as it is not the role of pleadings to plead evidence.

There has been a recent tendency for leave applications for *certiorari* to be made against the awards of the Industrial Court as a matter of automaticity with applicants treating the applications as if as they are ordinary civil appeals against the decisions of ordinary courts dealing with the events of the case. The recital that the applications for *certiorari* are based on a challenge of decision on illegality, irrationality or procedural impropriety or all of them appear as a matter of course and the court has to be on guard to see that the applications are not ill-founded and defeating the purpose of the leave stage (see what was quoted earlier from the De Smith, Woolf and Jowel, *Judicial Review of Administrative Action*).

One has to hearken to the observation of Edgar Joseph Jr FCJ in *Tuan Hj Sarip Hamid* at p. 447 that the salutary advice of Dunn LJ in *R v. Secretary of State for Trade & Ors, ex p Anderson Strathclyde plc* [1983] 2 All ER 233 at 239 f should be kept in the forefront of the mind of any lawyer who drafts the statement for purposes of O. 53 r. 1(2), and the affidavit in support thereof:

> ... Proceedings for judicial review are not designed for detailed enquiry into contested facts on which they rely in support of the relief claimed before the court at the first opportunity ...

His Lordship further added that similarly, it is worthwhile for the draftsman to remind himself of what Lord Diplock had said in *O'Reilly v. Mackman* [1983] 3 WLR 1096 at p. 1107, namely:

> ... The facts ... can seldom be a matter of relevant dispute on an application for judicial review, since the tribunal or authority's findings of facts, as distinguished from the legal consequences of the facts that they have found, are not open to review by the court in the exercise of its supervisory powers except on the principles laid down in *Edwards (Inspector fo Taxes) v. Bairstow & Anor* [1956] AC 14 at p 36; [1955] 2 All ER 48 at pp. 57-58) ...

Edgar Joseph Jr FCJ added that it is a counsel of prudence for a lawyer drafting his application under O. 53 r. 1(2) to ensure that it contains substantial particulars of the facts and matters on which he intends to rely in support of his application. His should also ensure that his affidavit in support of his application is as detailed and comprehensive as the circumstances will permit, and it should exhibit all the documentary exhibits which are truly relevant and upon which he intends to rely. The object of these steps is to ensure that the court has as complete a picture as is possible right from the start, of the case for the applicant who is seeking judicial review.

I had gone through all the available documents filed by the applicant in this case. There is a finding of the Industrial Court that the claimant did not steal the goods. The court also accepted the evidence of CLW3 that the claimant was in a state of shock at the so-called inquiry and had claimed that the charge of theft had been fabricated against him. Implicit in the said finding and the said acceptance of the evidence of CLW3 is that the so called confession by the claimant to his superior officers that he had taken and sold the goods has been impugned and cannot be relied upon. Issues of facts are for the Industrial Court to decide and it is not open to the High Court to review findings of facts unless the material before the court shows illegality, irrationality or procedural impropriety in the decision. That was not shown in the case before the High Court. The application is ill-founded.

Accordingly the court exercised its discretion and dismissed the application for leave.